SELECT STANDING COMMITTEE

ON

LABOUR, JUSTICE AND

INTERGOVERNMENTAL RELATIONS

FIRST REPORT

BUILDERS LIEN ACT

Fourth Session

Thirty-fourth Parliament

British Columbia Legislative Assembly

May 31,1990

Mr. Larry Chalmers, M.L.A.
Chairman

FIRST REPORT
of the
The Select Standing Committee
on
Labour, Justice and
Intergovernmental Relations

Legislative Assembly of British Columbia

Builders Lien Act

May 31,1990

90-05301//

Parliament Buildings,
Victoria, British Columbia

May 31,1990

To The Honourable,
The Legislative Assembly of
The Province of British Columbia,
Victoria, British Columbia

Honourable Members:

I have the pleasure to present herewith the *First Report* of the Select Standing Committee on Labour, Justice and Intergovernmental Relations which was referred the matter of the *Builders Lien Act* (RSBC Chap. 40) by a Resolution of the House on May 8, 1990

Respectfully submitted,

Mr. Larry Chalmers, M.L.A.,
Chairman,
(Okanagan-South)

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EXECUTIVE SUMMARY

The observations and recommendations contained in this Report result from a lengthy process of public hearings your Committee conducted throughout British Columbia, government and industry meetings and research. Public participation remained uppermost in the minds of the Members as well as consultation with other provincial jurisdictions, the results of which were carefully analyzed.

After much deliberation, your Committee has determined that the *Builders Lien Act* should not be repealed entirely because, among other things, there is an important value to be placed upon familiarity, continuity and certainty respecting the role of this particular piece of legislation. However, there were a number of issues which your Committee decided were of sufficient and significant concern that substantial amendment and improvement was considered necessary.

The recommendations range from items of simple clarification to completely new concepts. Most of the new concepts were based upon careful study of the experience of other jurisdictions. The general structure of the *Act* and its key components (the *lien, trust* and *holdback*) have been retained, albeit in a modified form.

Some of the highlights of the recommended changes for the Legislative Assembly to consider are as follows:

1. **Institution of a multiple holdback system and a mandatory holdback trust account into which the Owner's holdback will be required to be deposited, in order to improve the flow of funds in the construction chain, relieve the burden on the general contractor and provide additional security to lien claimants;**

2 **A system of progressive partial releases of the holdback as subcontracts are completed to further increase the flow of funds in the construction chain;**

3. **Provisions limiting the liability to lien claimants of purchasers of improved property;**

4. **Provisions limiting the liability of owners of property who have not themselves authorized construction work on their property;**

5. **Abolition of the confusing distinction between *materialmen* and *subcontractors*, and creating uniform filing times for all claimants;**

6. **Introduction of a *privity of trust* concept whereby each *trustee* is only liable to those with whom they are in a contractual relationship;**

7. **Prohibition of waiver of the Act;**

8. **Expanded rights to information and remedies for abuse of the Act and;**

9. **Provisions to streamline and make less onerous to owners the process to discharge liens.**

Your Committee believes the recommended changes will be beneficial to the public and particularly the construction industry through:

1. the elimination of identified inequities and anomalies;

2. the clarification of confusing and uncertain provisions;

3. the simplification of processes for discharging liens and allowing construction to continue despite the filing of liens;

4. increasing the protection for those (including claimants) who comply with the *Act*;

5. introducing provisions to generally assist those who deal with the *Act* on a daily basis in determining the course of conduct required of them under the *Act*, and rendering that course of conduct more efficient, timely and economic.

TERMS OF REFERENCE

That this House authorize the Select Standing Committee on Labour, Justice and Intergovernmental Relations to examine, inquire into and make recommendations on the matter of the *Builders Lien Act* with particular reference to the following:

1. the purposes of and the continuing relevance of the legislation in today's society;
2. the policy consideration behind the Act;
3. the desirability of repeal or reform to any or all of the provisions within the Act; and
4. the policy directions which would guide any reform.

and to report to the House as soon as possible, or following any adjournment, or at the next following Session, as the case may be to deposit the original of its reports with the Clerk of the Legislative Assembly during a period of adjournment and upon the resumption of the sittings of the House, the Chairman shall present all reports to the Legislative Assembly.

In addition to the powers previously conferred upon the said Committee by the House, the Committee shall have the following additional powers, namely:

(a) to appoint of their number one or more subcommittees and to refer to such subcommittees any of the matters referred to the Committee,
(b) to sit during any period in which the House is adjourned, is prorogued, and during any sitting of the House,
(c) to adjourn from place to place as may be convenient; and
(d) to retain personnel as required to assist the Committee.

Initially, this matter was referred to the same committee in December, 1987 - the First Session of the Thirty-fourth Parliament - and subsequently on March 23, 1988, April 13, 1989 and May 8, 1990. The complexity of this piece of legislation precluded an earlier report on this important matter.

COMPOSITION OF THE COMMITTEE

Second Session - Thirty-fourth Parliament

Ms. A. Kim Campbell, M.L.A. **Chairman**
(Vancouver - Point Grey)

Mr. Larry Chalmers, M.L.A. **Deputy Chairman**
(Okanagan South)

Honourable Lyall Hanson, M.L.A.
(North Okanagan)

Honourable John Jansen, M.L.A.
(Chilliwack)

Honourable Jack Weisgerber, M.L.A.
(South Peace River)

Mr. Brian Smith, Q.C., M.L.A.
(Oak Bay - Gordon Head)

Mr. Colin Gabelmann, M.L.A.
(North Island)

Mr. Moe Sihota, M.L.A.
(Esquimalt - Port Renfrew)

Mr. Larry Guno, M.L.A.
(Atlin)

Membership Changes:

Ms. A.K. Campbell, M.L.A.
(Vancouver - Point Grey)
- resigned seat in the Legislature effective October 22, 1988; no substitution was made.

Effective February 7, 1989 Mr. Larry Chalmers, M.L.A. assumed the position of Chairman with Mr. Colin Gabelmann, M.L.A. being elected Deputy Chairman.

Mr. Robert Skelly, M.L.A.
(Alberni)
- resigned seat in the Legislature effective May 10, 1988 and was substituted by Mr. Larry Guno, M.L.A.

Clerk to the Committee,
Mr. Craig James,
Clerk of Committees and Second Clerk Assistant

Consultant to the Committee,
Mr. Robert Ward,
Edwards, Kenny and Bray, Vancouver

COMPOSITION OF THE COMMITTEE

Third Session - Thirty-fourth Parliament

Mr. Larry Chalmers, M.L.A., **Chairman**
(Okanagan South)

Mr. Graham Bruce, M.L.A., **Deputy Chairman**
(Cowichan - Malahat)

Honourable Anthony Brummet, M.L.A.
(North Peace River)

Honourable Rita Johnston, M.L.A.
(Surrey - Newton)

Mr. David Mercier, M.L.A.
(Burnaby - Edmonds)

Membership Changes:

Mr. Brian Smith, Q.C., M.L.A.
(Oak Bay - Gordon Head)
- resigned seat in the Legislature effective November 15, 1989

Mr. Brian Smith, Q.C., M.L.A.
(Oak Bay - Gordon Head)

Mr. Colin Gabelmann, M.L.A.
(North Island)

Mr. Gordon Hanson, M.L.A.
(Victoria)

Mr. Moe Sihota, M.L.A.
(Esquimalt - Port Renfrew)

Clerk to the Committee,
Mr. Craig James,
Clerk of Committees and
Second Clerk Assistant

Consultants to the Committee,
Mr. Robert Ward and Ms. Kari Boyle,
Edwards, Kenny and Bray,
Vancouver, British Columbia

COMPOSITION OF THE COMMITTEE

Fourth Session - Thirty-fourth Parliament

Mr. Larry Chalmers, M.L.A., **Chairman**
(Okanagan South)

Mr. Dave Mercier, M.L.A., **Deputy Chairman**
(Burnaby - Edmonds)

Honourable Anthony Brummet, M.L.A.
(North Peace River)

Honourable Rita Johnston, M.L.A.
(Surrey - Newton)

Mr. Duane Crandall, M.L.A.
(Columbia River)

Mr. Angus Ree, Q.C., M.L.A.
(North Vancouver - Capilano)

Mr. Larry Guno, M.L.A.
(Atlin)

Mr. Gordon Hanson, M.L.A.
(Victoria)

Mr. Moe Sihota, M.L.A.
(Esquimalt - Port Renfrew)

Clerk to the Committee,
Mr. Craig James,
Clerk of Committees and
Second Clerk Assistant

Consultants to the Committee,
Mr. Robert Ward and Ms. Kari Boyle,
Edwards, Kenny and Bray,
Vancouver, British Columbia

ACKNOWLEDGMENTS

Your Committee wishes to express its appreciation to the individuals, groups, associations and companies who appeared before the Committee during the public hearings and contributed to the immense amount of material received by the Committee and to those who did not appear before the Committee but submitted in writing their comments on the *Builders Lien Act*. The Committee was made quite aware at the outset that the *Act* is an exceptionally complicated piece of legislation having a significant impact upon a major economic segment of British Columbia.

Your Committee appreciates the procedural and administrative support it received from the Office of the Clerk of Committees; the assistance of the Office of the Clerk; the Legislative Library, Hansard and the Ministry of the Attorney General throughout each phase of our inquiry.

The Committee acknowledges the counsel it received from Mr. Robert Ward and Ms. Kari Boyle of the law firm Edwards, Kenny and Bray in Vancouver, British Columbia.

ORGANIZATION

The *Builders Lien Act* was originally referred to the Committee's predecessors during the First Session of the Thirty-fourth Parliament in December of 1987 and was subsequently referred during the Second, Third and Fourth Sessions. Each subsequent Committee agreed to receive all of the material deposited and build upon this body of information which forms the basis of this *Report*. This Committee held its first meeting on May 17, 1990 and elected Mr. Larry Chalmers, M.L.A., Member for the electoral district of Okanagan South, as Chairman of the Committee. Mr. Dave Mercier, M.L.A., Member for the constituency of Burnaby - Edmonds was elected as Deputy Chairman.

Mr. Craig James, Clerk of Committees and Second Clerk Assistant became the Clerk to the Committee.

Mr. Robert Ward and Ms. Kari Boyle of the law firm Edwards, Kenny and Bray in Vancouver, British Columbia were again selected as the Consultants to the Committee.

A Subcommittee on agenda and procedure consisting of the Chairman, Deputy Chairman and Mr. Moe Sihota, M.L.A. was established.

METHOD OF OPERATION

The Select Standing Committee on Labour, Justice and Intergovernmental Relations held 23 meetings as follows during the First, Second and Third Sessions of the Thirty-fourth Parliament:

Thursday, December 17, 1987	Victoria	
Wednesday, March 2, 1988	Victoria	
Wednesday, March 23, 1988	Victoria	
Wednesday, April 6, 1988	Victoria	
Wednesday, May 11, 1988	Victoria	
Wednesday, May 25, 1988	Victoria	
Wednesday, June 8, 1988	Victoria	
Monday, September 12, 1988	Chilliwack	
Tuesday, September 13, 1988	Vancouver	
Thursday, September 15, 1988	Prince George	
Friday, September 16, 1988	Kelowna	
Monday, September 26, 1988	Victoria	
Tuesday, September 27, 1988	Fort St. John	
Tuesday, February 7, 1989	Victoria	
Tuesday, April 25, 1989	Victoria	
Monday, May 1, 1989	Victoria	(Subcommittee)
Thursday, May 9, 1989	Victoria	
Friday, May 24, 1989	Victoria	
Monday, October 30, 1989	Vancouver	
Monday, January 29, 1990	Edmonton	(Subcommittee)

uesday, January 30, 1990	Regina	(Subcommittee)
Thursday, February 1, 1990	Toronto	(Subcommittee)
Monday, February 26, 1990	Vancouver	(Subcommittee)
Thursday, May 17, 1990	Victoria	
Thursday, May 24, 1990	Victoria	
Thursday, May 31, 1990	Victoria	

The Committee heard from 48 individuals, associations, groups and companies and received 222 written submissions including addendums.

OBSERVATIONS AND RECOMMENDATIONS

A. THE HOLDBACK SECTIONS

1. The Present Law

Section 20(1) of the current Act directs "the owner or person primarily liable upon any contract under or by virtue of which a lien may arise" to retain a holdback.

This section makes it appear that retention of a holdback is required by the payer on any contract relating to the construction of an improvement. The section reads as though there is a multiple holdback system; other sections of the Act do not support such a conclusion, and it may now be safely concluded that the Courts will invariably treat the current Builders Lien Act as utilizing a single holdback system. Under the current Builders Lien Act, the owner is required to retain a holdback from the general contractor, but no one else in the construction chain is required to retain a holdback.

The single holdback system is said to have the attraction of simplicity. Your Committee is of the opinion that this system is detrimental to the free flow of funds in the construction chain.

The single holdback system is also, from the perspective of the general contractor, a punitive one. Under the present B.C. Act everyone in the construction chain has a direct claim against the Owner's holdback. It is the solvent general contractor who bears the financial burden of unpaid subtrades, simply because the unpaid subtrades look to the holdback from the owner to the general contractor to satisfy their lien claims. This is so even though it may not be the general contractor who is defaulting in payment of his bills; it may be a subcontractor further down the line. Most contracts between owner and contractor require the contractor to indemnify the owner against lien claims. A general contractor's liability under the Builders Lien Act is not limited by amounts which he might hold back, and this factor can tend to impede the flow of funds.

By way of illustration, consider an owner who has let a general contract in the amount of $100,000 and suppose the general contractor has let two subcontracts each for $45,000; the contractor intends to profit by $10,000. Subcontractor (b) lets a contract for materials for $10,000.

Under the single holdback system, the owner will retain $10,000 (10%) from the contractor, and this pool of money will be available to satisfy lien claims. If the owner retains the $10,000, then it is protected by s.5 of the Act since s.5 provides that the owner cannot be liable to lien claimants for more that the amount payable to the general contractor. The owner is protected and the subtrades are offered a measure of security.

The general contractor does not have any section which provides protection equivalent to that given to the owner under s.5. If the owner pays the $10,000 holdback to lien claimants, the contractor's profit is gone. In most cases, the contractor will also hold back even though there is no statutory right to do so. The problem identified by the Committee is that lien claims are limited by the owner's holdback, not the contractor's holdback.

Thus in the example illustrated, one might expect that the contractor would hold back 10% on each of the $45,000 subcontracts so that instead of $10,000 being held back as the Act contemplates, there would be $19,000 held back; $10,000 from the contractor, and $4,500 from each of subcontractor (a) and subcontractor (b). However, even this procedure will not protect the contractor. Suppose subcontractor (b) becomes insolvent, but

subcontractor (a) completes his work. Subcontractor (a) is entitled to payment, including the $4,500 held back. The contractor therefore only has $4,500 to "reimburse" himself for monies paid out to the lien claimants such as the material man in this example. If the material man is totally unpaid, it will claim the $10,000 holdback from the owner, but the contractor will only have $4,500 in his hands to reimburse himself, so that the contractor will lose $5,500.

In the above example (which is very simple compared to most contract situations) the only way a contractor could protect itself would be to hold back $10,000 from each of subcontractor (a) and subcontractor (b). Thus, for the contractor to properly protect itself, a holdback of $30,000 would be required ($10,000 from the contractor, and $10,000 from each subcontractor). The alternative (and more likely) situation is equally unsatisfactory, namely that the contractor in effect ends up guaranteeing, at its own expense, the obligations of his subcontractors, which is not what was intended by the legislation.

Recommendation #1

Your Committee recommends that amendments be made to improve the flow of funds in the construction chain, to relieve the burden on the general contractor and to provide additional security to the lien claimants. In particular, the Committee recommends:

(a) the institution of a multiple holdback system; and

(b) the owner be required to place holdback funds in a separate trust account.

2. Multiple Holdback System

A multiple holdback system is a system whereby each contract in the construction chain will be subject to a holdback. Under the current system in British Columbia a general contractor will frequently retain large sums of money throughout the life of a large construction project, and will not release it until the last work is done. In a multiple holdback system, there is no statutory incentive on a general contractor to retain excessive sums to ensure it is protected from claims made against the holdback fund retained by the owner.

In order to make the system work, the legislation should provide that where the lien is claimed by someone other than the contractor, the amount that may be claimed is limited to the amount owing to the contractor or subcontractor for whom the work was done or the materials placed or furnished.

The contractor will not have to retain large sums to protect itself, nor will a holdback have to be retained until completion of the entire project (retention/release of the holdback will be governed by the completion or abandonment of the Contract under which the lien arose). Liability for lien claims will be limited by a provision such as that suggested above.

3. Holdback Trust Account

Section 20 of the current Act provides that the "owner...shall retain...10 percent of the value of the work..done for a period of 40 days after the contract has been completed". The issue is whether that section requires the owner to actually hold a separate fund of money equal to ten percent of the value of the work from time to time, or whether it is simply a prohibition against paying more than ninety percent of the value of the work to the contractor. The Act does not require such a fund to be held at present.

Since the lien claimant has a lien against the land in any event, one might ask whether there is really a problem if the owner does not retain a separate pool of money by way of holdback. In fact there are two problems which commonly arise.

First, there may be no equity in the property against which the lien can operate. It there is no separate holdback fund, lien rights may be academic where the value of the property is subject to prior encumbrances. Moreover, even where there is, initially, equity available to lien claimants, in a falling real estate market that equity may be eliminated.

Secondly, it will be obvious that liens being filed against a project are commonly indicative of the inability of someone in the construction chain to pay his debts. That problem may be with the owner, indeed the construction project itself may have put the owner into financial difficulty. In such case, the property may well be subject to foreclosure proceedings resulting in lien claims being discharged from the title. In such a situation, if there is no separate pool of monies available by way of holdback, the lien rights will be without value.

Recommendation #2

Your Committee recommends that:

(a) **the owner be required to establish at chartered bank, credit union or trust company a holdback trust account;**

(b) **the owner be required to pay the 10% holdback into the holdback trust account as periodic payments fall due to the contractor;**

(c) **the holdback trust account be administered jointly by the owner and general contractor, as trustees. If there is no single general contractor (i.e. the owner lets several contracts directly), then only one holdback trust account would be required, jointly trusteed by the Owner and One of the contractors or other qualified person;**

(d) **the funds in the holdback trust account be held in trust for those claimants in privity with the contractor, i.e. only those in privity with the general contractor would be able to make a direct claim against the holdback trust account;**

(e) **in the absence of some contrary agreement with the contractor, interest on the holdback trust account accrue to the owner (see section 39 of the Saskatchewan Act);**

(f) **the lender providing the Owner with funds for the improvement should have the right, provided the lender is a chartered bank, credit union or trust company, to have custody of the holdback trust account, in which event the owner is deemed to have complied with the requirements of the Act. This provision would permit such lenders to retain the desired control over the holdback while not jeopardizing the integrity of the holdback for the benefit of those in privity with the contractor (see sections 34(4) and 38(9) of the Saskatchewan Act);**

(g) **the holdback trust account should be subject to "phased" or "progressive" release i.e. a portion should be able to be released as each contract or subcontract is completed, upon appropriate proof. In order to properly implement this proposal, provisions should be included for a substantial performance certification process for both the prime contract and subcontracts (see the Saskatchewan Act, section 41, as amended).**

(h) **the holdback trust account shall be expressly exempt from the garnishment provisions of the Court Order Enforcement Act.**

Your Committee is informed that the ideas hereinbefore expressed are not all original. Many of them will be seen in the equivalent Saskatchewan Legislation.

It should be noted that your Committee is only suggesting that there be a holdback trust account in respect of the payments to be made by the owner, not by all payers. When combined with the multiple holdback system, the Act would provide:

(a) a lien would continue to charge all amounts directed to be retained in favour of claimants whose liens are derived under persons to whom the money required to be retained is payable (s.20 of the current Act);

(b) as funds are released from the holdback trust account, the recipients of the funds from the holdback trust account would receive the monies subject to the trust provisions of the Act. That is to say, an unpaid subcontractor who enforced his lien against the holdback trust account would receive the funds in trust for the benefit of those persons with whom he is in privity.

In order for this system to work and be enforceable:

(a) personal liability must accrue to the owner in the event, and to the extent that, the holdback trust account is not maintained as required by the Act;

(b) the owner must be required to provide evidence of payment into the holdback trust account from progress payments as required, as well as provide particulars of amounts in the holdback trust account upon demand (see Recommendation 25 below);

(c) failure to make a deposit into the holdback trust account should be deemed a default by the owner under its contract with the contractor, entitling the contractor to terminate on specified notice.

Exemptions

The Saskatchewan Act exempts "residential housing" (condominium units, four-plexes and houses) from the holdback trust account requirements. (See section 38) This exemption was made on the policy ground that it would be an impossible administrative task to set up and administer separate trust accounts for each home in a large residential development. While your Committee remains concerned about exempting such a broad sector of the industry from the holdback trust account provisions, it recommends that such an exception be made in the case of residential developments, which would remain subject to the "notional" holdback requirement, in order to avoid the administrative difficulties which would inevitably result.

In addition, for the reasons discussed under item C3 below, your Committee also recommends that the Provincial Crown be exempted from the holdback trust account requirements.

Recommendation #2A

Your Committee recommends that the residential housing sector of the industry and the Provincial Crown be specifically exempted from the holdback trust account provisions.

4. Purchaser's Holdback

There has been considerable confusion and hardship arising out of circumstances involving the sale of land or improvements to a third party before expiry of the applicable lien periods.

Sections 75 and 76 of the Condominium Act provide some protection for purchasers of strata lots from an owner/developer by requiring the purchaser to retain a holdback (currently 7% of the gross purchase price by regulation) for 40 days after conveyance. The purchaser's liability is limited to the lesser of:

(a) total amount of the claims filed; or

(b) the full amount of the holdback provided such sum is paid into Court.

The advantages of such provisions may be obvious (apart from the comments regarding filing times, below) but there is currently no similar protection for purchasers of strata lots from someone other than an owner/developer or other types of property incorporating some "improvement". As the law currently stands, a purchaser's interest in such land is subject to liens filed after the conveyance so long as they are filed within the time limits set out in s.22; and it is unclear as to whether a purchaser is entitled to claim the protection available to an "owner" under s.5 (see Recommendation 3(b) infra) or under s.20. A new Act should contain some provisions protecting all purchasers. Such a provision should not apply in the event the Court finds that the conveyance of the property was to defeat a claim under the Act. That is, the legislation should anticipate the situation where a developer simply transfers property at an under-value to a related company to avoid liability under the Act.

Recommendation #3

Your Committee recommends that in order to protect purchasers of improved property:

(a) all such provisions should be incorporated in the British Columbia Builders Lien Act;

(b) subject to (d) hereof, a purchaser will be required to hold back a certain percentage of the purchase price of the property (as defined by regulation, but should not be greater than 10% of the gross purchase price), for a period of forty days from the later of:

(i) the completion of the conveyance: and

(ii) the completion, abandonment or termination of the head contract;

(c) assuming the purchaser is entitled to hold back a percentage of the purchase price, then the purchaser should have the right to vacate all liens upon proof of the calculation of the required holdback and payment of that amount into Court;

(d) if:

(i) the purchaser receives a certificate (in a form defined by Regulation) signed by the joint trustees of any holdback trust account applicable to that property, certifying the value of the work completed, the amount held in the holdback trust account, and that the amount held back has been correctly calculated; and

(ii) the purchaser does not have actual or constructive notice of a gross discrepancy with respect to the value of the work or the calculation of the holdback trust account,

then the purchaser shall, instead of holding back a percentage of the purchase price of the property, assume the vendor/owner's responsibility as trustee of the holdback trust account;

(e) in the event that the purchaser is entitled to and does assume the vendor/owner's responsibility for the holdback trust account, then the vendor/owner is discharged of that responsibility, except to the extent of any discrepancy in the holdback trust account to the date of the conveyance;

(f) the purchaser's liability should be limited to:

(i) if the purchaser assumes a holdback trust account, to the amount of that trust account; or

(ii) where the purchaser is entitled to hold back a percentage of the purchase price, to the amount of that required holdback;

(g) in the absence of any contrary agreement with the contractor, interest on any holdback trust account assumed by the purchaser shall accrue to the credit of the vendor/owner as to interest earned up to the date of the conveyance, and to the purchaser thereafter;

(h) interest on any amount which the purchaser is entitled to hold back as a percentage of the purchase price shall accrue to the credit of the vendor/owner;

(i) **any person claiming entitlement to the holdback trust account or the amount held back from the purchase price should be entitled to apply to the Court for an order for relief.**

5. Payments in Good Faith

Section 20(3) of the B.C. Act provides that an owner, contractor, or subcontractor may make payments to a person entitled to file a claim of lien up to ninety percent of the value of the work, services or material in question subject to the proviso that the payments are made "in good faith", and that such payments shall operate as a "discharge" of any lien to the extent of the payment. Your Committee understands that the phrase "in good faith" in this Section has not been well defined in the case authorities and has been the source of some confusion. In particular, an issue arises as to whether amounts are advanced in good faith if they are advanced after a lien has been filed. The Saskatchewan Act deals with this problem in Section 40 by providing that a payer may without jeopardy (i.e. the payer's liability for lien claims will be discharged to the extent of the payment) make payments up to ninety percent unless prior to doing so it receives written notice that a lien or claim of lien is registered. In that event, the payer may retain in a separate trust account an amount sufficient to satisfy the lien in addition to the holdback and continue to make payments on the contract. This provision allows work to continue and payments to be made notwithstanding the filing of a lien, without the delay and inconvenience now experienced by the necessity to obtain a discharge of any liens under Section 32 before advancing payments on account of the work. The recommendation herein is to add provisions, as opposed to amending or deleting the provisions of Section 20(3) which may have utility in respect to other matters.

A further problem results from the use of the word 'discharge' in Section 20(3), i.e., does payment of the ninety percent result in an actual discharge of the registration of a lien from title to the lands or merely in a defense to the payer?

Recommendation #4

Your Committee recommends:

(a) **that each payer should be entitled to make payments up to ninety percent of the value of the work, services or material unless the payer receives actual notice (not necessarily written notice) of the registration of a lien by a claimant below him in the construction chain. In that event, the payer should be entitled to withhold the amount of the lien provided the funds are deposited into a separate trust account and continue to make payments on a contract up to 90% of the price less the amount retained.**

(b) **the language of s.20(3) should be clarified to indicate, in accordance with the case authorities, that payment of the ninety percent results only in a defense to the payer and not an actual discharge of the registration of the lien from the title to the lands.**

6. Time Limits for Retention of the Holdback

The terms 'completed', 'abandoned' and 'otherwise determined' have created substantial confusion and uncertainty. With respect to 'completion', it is currently defined to mean 'substantial performance, not necessarily total performance'. Other Provinces have taken steps to provide mechanisms to more accurately define when 'substantial performance' has been achieved either by reference to specific dollar values or by authorizing a third party to provide a Certificate of Substantial Performance. Under the multiple holdback system, then, in the Ontario Act, each payer may pay out his holdback where the contract or subcontract has been certified complete under Section 33 provided all liens have expired, have been satisfied or discharged, or monies have been paid into Court (see Section 25). Since each payer is required to keep a separate holdback and each contract or subcontract can be substantially completed separately from others, this system permits a 'phased payout' of the various holdbacks which, unlike the current B.C. Act, does not depend upon completion of the entire project or the head contract. Presumably this procedure will increase the flow of funds down the contractual chain and prevent prejudice to those who have supplied labour or materials early in the project.

Recommendation #5

Your Committee recommends that:

(a) The definition of 'substantial performance' be clarified in one or both of the following ways:

(i) by reference to specific dollar values (see Alberta (1985) s.2; Saskatchewan s.2.3; Manitoba s.2; and Ontario s.2); or

(ii) by authorizing a third party by statute to provide a certificate of substantial performance.

(b) The definition of "abandonment" be limited to abandonment by one of the parties to the contract under which the lien arose and the concept of abandonment of the improvement be abolished.

(c) The phrase "otherwise determined" be eliminated and the term "terminated" be substituted.

After some consideration your Committee does not recommend the use of an occupancy permit as prima facie evidence of completion.

7. Discharge of Liens

The relevant provisions in the current Act are ss.20(4) and 32. Section 32 provides an opportunity for an Owner to cancel liens by payment into Court or posting of security in the full amount of the lien plus costs. This requirement can be extremely onerous for two reasons:

(a) the section only permits an application to be made in the name of the owner. The head contract typically requires the contractor to keep the property free of liens and in order to make an application pursuant to section 32 the contractor is required to obtain the owner's permission to use its name. Such consent is not always given and even if it is, the monies in Court appear to all the world to be the owner's money and not the contractor's; and

(b) the amounts required to be paid in may substantially exceed the amount of the holdback and there is no mechanism for reducing the amount to be paid in by reason of setoff or counterclaim or even if the lien is proven to be inflated.

Section 20(4) appears on its face to provide a parallel right to achieve discharge of liens upon payment into Court of the amount of the holdback alone. In fact, however, the Court of Appeal has held that s.20(4) provides merely a defense to the owner and cannot be used to obtain actual discharge of the liens.

Your Committee believes that there needs to be one consistent and rational method for the discharge of liens and that such right not be limited to the owner. The current Acts of Alberta, Saskatchewan, Manitoba and Ontario contain provisions permitting applications to Court for an order vacating any registered lien. While the sections differ, they are consistent in providing more flexibility for the Court regarding the amount to be paid in or to be posted as security in order to effect a full discharge of the registered liens. The Acts of Saskatchewan (s.56) and Ontario (s.54) seem to provide a simple but workable system which can be summarized as follows:

(a) any person may apply ex parte for an order vacating a lien on paying in the full amount of the lien plus costs. In the event of an ex parte application, the security to be posted must be in the form of currency; and

(b) any person may apply on notice to other persons affected for discharge of a registered lien upon payment into Court or posting of security in an amount that the Court considers reasonable in the circumstances.

Both Acts provide an opportunity for the amount in Court to be reduced and provide that where an Order for discharge is made the lien ceases to attach the lands and the holdback and becomes instead a charge only upon the amount paid into Court or security posted.

Recommendation #6

Your Committee recommends that s.20(4) of the current Act should be abolished and s.32 amended to accord with the provisions of the Saskatchewan and Ontario Acts as set out above.

8. The Noranda Rule

The Courts have held that the "amount directed to be retained...in favour of claimants" as set forth in Section 20(2) of the Act is limited to the greater of:

(i) ten percent of the value of labour and materials devoted to the project; or

(ii) the amount due to the contractor from the owner pursuant to the head contract (which may exceed the ten percent at any particular time).

Section 20(6) forbids the owner from applying the "percentage required to be retained" against damages for noncompletion. The question arises whether the owner can apply amounts in excess of the ten percent to complete the project. The Supreme Court of Canada has settled the issue by providing that amounts in excess of the ten percent could be applied to satisfy additional costs of the owner in completing the contract or correcting any work that was improperly done (the "Noranda Rule").

Recommendation #7

Your Committee recommends that the Noranda Rule be given legislative authority in the British Columbia Act.

B. FILING TIMES

1. The Current Situation - An Illustration of the Difficulties

There are currently different filing times for material men and subcontractors. Some submit that a material man should have a longer period for filing a lien than a subcontractor. The rationale is that a material man, not being on site, cannot know from day to day what is happening on the project and therefore should have the longest filing time possible. Thus we have different filing times for materialmen and subcontractors under the current s.22. Your Committee does not think that the rationale for different filing times can survive serious scrutiny; the difficulties caused by disparate filing times for subcontractors and material men far outweigh any benefit; the distinction between these classes of claimants is altogether unnecessary and counterproductive.

By s.22, a subcontractor's filing time is governed by the completion or abandonment of the general contract (in a multiple holdback system it would presumably be governed by the contract under which the lien arises), while a filing time for the material man is governed by the completion or abandonment of the improvement. There are situations where the disparity is important. Note that by s.22(1) a claim of a subcontractor must be filed not later than 31 days after the contract of the contractor has been completed or abandoned.

By s.22(2) a claim of lien for materials must be filed not later than 31 days after the improvement has been completed or abandoned.

By definition the words "the contract of the contractor" refers to any contract made directly by the owner.

Consider the following example:

Owner

Material Man (2)

Electrical Contractor (completed March 5th)	Plumbing Contractor (abandoned January 1st)
subcontractor (1)	subcontractor (2)
material man (1)	material man (3)

Assume today's date is April 6th. The filing time for subcontractor (1) expires today (31 days after the March 5th completion date of the electrical contractor). Unless the whole improvement has been completed, the filing time for material man (1) has not yet even started to run (see s.22(2)). Material man (2) may have supplied his materials a year ago: while there is case law on the topic, your Committee is told, from the definition of "contractor" under the Builders Lien Act it is not clear whether material man (2) is properly classified as a "contractor" (because he contracted directly with the owner), in which event his lien expired 11 months ago (approximately), or a material man, in which case the filing time for his lien is not yet running.

The filing time for subcontractor (2) expired February 1st (31 days after January 1st). This is in spite of the fact that the filing time material man (3) has not yet started to run.
Your Committee respectfully submits that the current situation is totally illogical. Consider the practical consequences:

The electrical contractor completes March 5th. The owner can pay the holdback to the electrical contractor 40 days later - April 15th. On April 16th there will be no holdback for material man (1) who supplied subcontractor (1), yet the filing time for that material man has not yet started to run. Can material man (1) claim against the land? His argument would be that he filed his lien in time and is entitled to lien rights. The owner's argument, on the other hand will be obvious: the owner maintained a proper holdback, and did not pay it out for 40 days following the completion of the electrical contract. Thus by s.5 of the Act he cannot be liable to a lien claimant for any amount greater than that payable to the electrical contractor, and that amount is zero. Who wins or loses in this situation may not be so important as considering that:

(a) either the owner or the material man, both having complied completely with the Act, is going to lose; and

(b) the solution to this problem cannot be found in the Builders Lien Act, but only in the authorities.

The problems become even more acute when one considers the issue of "abandonment". On the decided cases, abandonment does not mean abandonment by the general contractor, or by the owner, or by anybody in particular. It is very difficult to determine what "abandonment" means for the purposes of a material man's filing time. The leading authority, a decision of the Supreme Court of Canada, suggests that unless a project has been hopelessly and irrevocably abandoned, presumably forever, and by everyone with any interest in it, the material man's time is not running. This is a totally unsatisfactory situation, your Committee believes.

Recommendation #8

Your Committee recommends that the requirement to classify a lien claimant either as a subcontractor or as a material man be abolished entirely.

We do so in part because of the reasons given in this section relating to difficulties arising from disparate filing times.

In the event that this distinction is not abolished, then your Committee recommends that the difference between filing times for subcontractors and material men be eliminated. Further, filing times should be referable to the contract under which a lien arose, whether the filing time is triggered by completion of the contract, abandonment of the contract, or some other "determination" of that contract. Consequential amendments will be necessary to appropriately tie filing times to the applicable contract due to the multiple holdback system.

2. Strata Lots

Currently, filing times for liens against new strata lots conveyed from owner/developer to purchaser are regulated by ss.75 and 76 of the Condominium Act R.S.B.C. 1979 c.61 rather than the Builders Lien Act. These sections may constitute a trap for the unwary since the effect of the sections is to limit the time for filing to 31 days after the date of conveyance - which can be significantly shorter than under the Builders Lien Act, particularly if conveyance occurs prior to completion. The authorities demonstrate absurd results - it has been held that a landscaper's time for filing his lien has expired before he even commenced working.

Recommendation #9

Your Committee recommends that all filing times including those for strata lots be consistent and be governed by the Builders Lien Act.

C. OWNERS

1. Definition

The definition of "owner" in the B.C. Act has led to many difficulties of interpretation. Other Provinces, notably Ontario, have simplified the definition by placing its constituent requirements in subparagraphs as follows:

"Owner" means any person "... having an interest in a premises at whose request, and

(i) upon whose credit; or
(ii) on whose behalf; or
(iii) with whose privity or consent; or
(iv) for whose direct benefit;

an improvement is made to the premises..."

Recommendation #10

Your Committee recommends that the definition of "Owner" be simplified.

2. Non-contracting Owners' Liability (Section 13)

In the current Act, it is the owner's equity in the property which is subject to being charged by a builder's lien. That principle raises the question: "who is an owner"?

An owner is currently defined in the Act as "including a person.... at whose request and on whose credit, or on whose behalf, or with whose privity or consent or for whose direct benefit, the work is done...". It appears from the definition section that, for an owner to be liable, it must participate at least to some degree in the construction process.

The definition section, however, must be read as modified by s.13 which provides, inter alia, that "...all improvements done with the knowledge... of the owner... shall be held to have been done at the instance and request of the owner...".

To attract liability as an owner under the Builders Lien Act, the owner need not be the person who contracted for the work. A statutory "owner" could include a number of different persons such as the registered owner of the fee simple or the holder of some lesser interest in the land such as a lease. Such persons may have no involvement in the improvement on the lands and often are not parties to the construction contract. Nevertheless, such "owners" may be rendered liable simply by knowing that an improvement is being constructed on the lands, regardless of whether or not that owner authorized the work. This is not an academic situation, and frequently arises, your Committee learned, in situations where the registered owner has given a long term lease of the property to developers.

On the current state of legal authorities, there is no limitation of liability against a builders' lien in favour of the non-contracting owner. This arises because in the normal case, the owner's only protection against lien claimants is in s.5 which states that the owner cannot be liable for a greater sum than that payable to the contractor. The current state of the law is that s.5 does not apply unless there is a contractual relationship between the contractor and the owner, with the result that the non-contracting owner's potential liability is greater than that of the owner who ordered the work to be done.

In the event that provisions for a holdback trust account are implemented, provisions should also be made to exempt a non-contracting owner from the requirement to implement a holdback trust account, such that a claim of lien would merely attach to the interest of the non-contracting owner in the land.

Section 5 should be amended to provide that no lien attaches to make an owner liable for a greater sum than the sum payable by the party or parties to the general construction contract, if a single holdback system is maintained. If a multiple holdback system is implemented, then the section will have to be revised to provide that the amount in respect of which liens may attach shall be limited to the amount owing to the contractor or subcontractor for whom the work was done or the materials placed or furnished.

Recommendation #11

Your Committee recommends that the protection afforded to a contracting owner should be equally afforded to a non-contracting owner.

3. The Crown

(a) Federal Crown Land

For constitutional reasons, liens cannot be filed against Federal Crown land.

(b) Provincial Crown Land

Under the current Act, the Provincial Crown is probably subject to all of the provisions of the Act. The Committee supports this principle, but recognizes that there is some confusion with respect to this issue which should be clarified in the legislation by amending the definition of "owner" to specifically include the Provincial Crown.

However, it is the Committee's view that it is contrary to public policy for public facilities to be sold to satisfy lien claims. Accordingly, while Provincial Crown land should be subject to liens, it should be exempt from the provisions permitting an order for sale of such lands (section 29(2)). In addition, the Provincial Crown should not be subject to the recommended provisions requiring a holdback trust account.

Recommendation #12

Your Committee, after much consideration,recommends that:

(a) the definition of "owner" be clarified to specifically include the Provincial Crown;

(b) that the Provincial Crown be subject to all of the provisions of the Act, with the exception of:

(i) those provisions permitting an order for sale of liened land; and

(ii) those provisions requiring a holdback trust account.

D. ENTITLEMENT TO LIEN

The current Act distinguishes between a materialman and a subcontractor and many of the difficulties with such a distinction have already been discussed in regards to disparate filing times. Recommendation #8 provides for elimination of this distinction altogether. Assuming that recommendation is adopted, there will stil remain problem areas from the judicial interpretation of the current legislation which should be rectified and eliminated in the new definition of "lien claimant".

On the current state of authorities, in order to prove a lien for the supply of material the material man must establish that:

(a) the material was supplied "for an improvement";

(b) the material was delivered to or placed on the land on which the improvement is situate; and

(c) that the material was not "transformed" before delivery, though this point is arguable.

The authorities have decided, quite clearly, that it is not sufficient to be able to prove that materials were utilized in the construction of an improvement, nor is it sufficient to prove that materials were supplied to two or three improvements and subsequently utilized in respect thereto. It must be clearly proven that when materials were supplied, they were supplied and intended for a specified improvement. This test may seem fair if the idea is that a lien should arise by virtue of one's intention to improve a particular piece of property, but can become manifestly unfair when put into practice.

It is not unusual for a material supplier to be supplying a contractor who has two or three improvements underway pursuant to one contract with one owner. Suppose a cement subcontractor knows that he is supplying to a contractor 90 units of cement to be utilized in three buildings for the same developer; 50 for the first building, 30 for the next, and 10 for the last. Assume the 90 units of cement are supplied in 10 loads. It is not enough for the material man to be able to allege when a truck leaves his yard that he knows the cement is going to be used by the contractor on one of the three improvements, and that when all ten loads have been delivered there will be 50 units in building A, 30 in building B and 10 in building C. The material man will have no claim unless he can positively identify, even in the case of generic type materials such as cement or gravel, that a particular load is going to a particular building. Many building products are delivered to central stockpiles before being moved on site.

To consider the extreme situation, suppose a supplier of plumbing products is supplying all of the washbasins for two identical houses for the same owner. Unless a particular washbasin can be positively identified with a particular house at the time it is supplied to the contractor, the material supplier will have no lien.

Recommendation #13

Your Committee recommends that the lien should be allowed to follow the form of the contract, and that something equivalent to s.29 of the Saskatchewan Act be adopted.

That section provides:

"Where an owner enters into a single contract for improvements on more than one parcel of land owned by him, any person providing services or materials under that contract, or under a subcontract under that contract, may choose to have his lien follow the form of the contract and be a lien against each parcel for the price of all services and materials provided by him to all of the parcels of land."

As to the second requirement that the materials be delivered to or placed on the land on which the improvement is situate, the authorities have held that such delivery does not have to be made by the material supplier itself.

Recommendation #14

Your Committee recommends that it be made clear in the Act that a lien claimant supplying materials does not have to personally deliver the materials, and that delivery by a third party will suffice.

Finally, there is an area in somewhat of a state of confusion and that arises from the so-called "transformation" issue. Two of the sections of the Act basically provide that a material man is one who supplies material, which material is delivered to the site. Thus, so the argument goes, if the material as supplied is transformed such that it has different qualities by the time it arrives at the site, the claim of lien must fail. An example of "transformation" is cement being "transformed" into concrete by the addition of water before being placed on the site (which might happen, for example, where a cement supplier delivers his product to a pre-cast fabricator), a sheet metal supplier whose sheet metal is bent and punched off site for utilization in heating ducts, and so on.

Recommendation #15

Your Committee recommends that "transformation" of materials should be irrelevant to the right of a lien claimant to claim a lien.

E. TRUST PROVISIONS

Trust provisions are contained in s.2 of the current Act. They are designed to ensure that those who work on an improvement will receive the benefit of monies generated by the construction in question. The trust concept provides to the beneficiary of the trust priority over creditors unconnected with the project in respect to funds paid pursuant to the construction contract, and provides penalties for those who utilize the trust funds for extraneous purposes.

To succeed in an action for breach of trust, the claimant has to prove that he is a "material man", "subcontractor", and so on, within the meaning of the Act. In other words, the trust claimant has all the problems that a lien claimant has in asserting his claim, except that the trust claimant does not have problems with filing requirements, filing times and the like; the trust section is, therefore, most often resorted to by a party who would otherwise assert a claim of lien, but for the fact that the filing times are expired.

The trust claimant takes priority after lien claimants, but before general creditors.

Among the named beneficiaries of the trust created by s.2 is the Workers' Compensation Board. Your Committee believes that there is no justification for the Workers' Compensation Board to be a trust claimant.

Recommendation #16

Your Committee recommends that the Workers' Compensation Board should no longer be included as a trust beneficiary.

Your Committee's comments regarding the trust provisions do not purport to deal with or impact upon the liability of financial institutions, directors, officers or other third parties, whose liability remains to be determined pursuant to both the Act and common law. While complex, the law on these issues is developing and your Committee does not believe specific statutory amendment is required.

1. Scope of Duty of the Trustee

The extent of duty of the trustee under the current s.2 is difficult to determine simply by reading the statute. The section provides that the trustee is a trustee of all sums received and that he shall not appropriate or convert any part thereof to his own use until all workmen, material men and so on are paid. The section suggests that the trustee has to keep paying until his profit is exhausted, notwithstanding that the payee under his contract is entirely satisfied. The authorities suggest otherwise.

If the duty to maintain a holdback comes to an end under a phased-release, multiple holdback system, the duty under the trust provision should also come to an end. When those with whom the trustee is in privity have been paid then the trustee should be able to take his profit.

Recommendation #17

Your Committee recommends that a "privity of trust" concept be introduced into the trust provisions to create a system of successive trusts which limits the liability of the trustee at each level such that there would have to be a contractual relationship between the claimant and the trustee before the trust claim could succeed.

2. Application of the Trust to a Highway or Improvement by a Municipal Corporation

Section 3 of the Act provides that "nothing in this Act extends to a highway or to any improvement done or caused to be done thereon by a municipal corporation".

The rationale for this section is easy to understand when one considers that one remedy for a lien is a sale of the land and improvement. Public policy may dictate that the Courts should not be selling highways or city halls because of unpaid subcontractors working on such projects. There is, however, no reason that the trust provisions should not apply to such a project.

Recommendation #18

Your Committee recommends that s.3 of the Act be amended to provide that: "With the exception of the provisions of s.2, nothing in this Act extends", etc.

F. PRIORITIES

A number of difficulties relating to priority issues have been created by the present Act.

1. Multiple Holdback System

If the recommendation of the Committee regarding implementation of the multiple holdback system is accepted, then:

(a) there should be created classes of lien claimants byreference to their "payer";

(b) with respect to monies held back by each payer, no member of a class would be entitled to priority over any other member;

(c) the amount held back by the owner would be held in a "holdback trust account" as previously recommended; and

(d) monies paid out of the holdback trust account would be trust monies for the benefit of all those in privity with the recipient.

Your Committee believes such a system will benefit the subcontractors (and sub-subcontractors) as well as the contractor by increasing the flow of funds and maximizing the distribution to those entitled.

2. Section 6

The effect of s.6 of the present Act and the priority, if any, to be given to mortgage advances involves a number of issues which should be specifically addressed. The B.C. Court of Appeal has recently confirmed that the purpose of s.6 of the Act is to ensure that lenders will advance money in order to spread the benefits of building construction to the workers and material suppliers. The Law Reform Commission of British Columbia has issued a report on "Mortgages of Land: The Priority of Further Advances" (January, 1986) which deals, inter alia, with s.6. The major difficulties your Committee has identified relating to the priority of mortgages are as follows:

(a) unlike s.24 of the Property Law Act (which deals with priorities as between various mortgages and other charges) there is no requirement in s.6 for notice of a Lien to be delivered to the Mortgagee. The common practice, therefore, is for the Mortgagee to make preadvance searches to ensure no liens have been filed. Your Committee believes that such a practice is not unreasonably onerous for mortgagees compared to what could be a relatively burdensome onus for lien claimants to ensure that all registered mortgagees have notice of the lien.

(b) it is unclear whether an advance made after the filing of one lien loses priority to that lien only or to all liens whenever filed. There is a dearth of British Columbia authority with respect to this issue although cases from other provinces dealing with similar, but not identical, sections have held that only liens filed prior to the mortgage advance take priority with respect to that advance.

Recommendation #19

Your Committee recommends that s.6 be amended by providing in subsection (1) that:

> **"A registered mortgage has priority over a lien to the extent of the mortgage money bona fide secured or advanced in money prior to the filing of that claim of lien...";**

and in subsection (2):

"Advances or payments made under a mortgage after a claim of lien has been filed shall rank after that lien..."

3. The Law Reform Commission

The Law Reform Commission (LRC) notes that s.6 places a very powerful weapon in the hands of lien claimants since by the mere filing of a lien the entire flow of funds to the whole construction project can be halted bringing the project itself to a standstill. The LRC concludes that the balance presently struck by the Builders Lien Act is not an appropriate one and recommends an amendment to s.24 of the Property Law Act and s.6 of the Builders Lien Act to give "construction" mortgages complete priority so long as the advances are "made bona fide for the purposes of enabling the completing of an improvement on the land".

Problems regarding advances inevitably arise when some link in the construction chain falters and breaks causing a disruption in the flow of funds in the construction chain and a threat of breakdown of the entire project. As the LRC notes at p.27:

> "When a construction project comes to a halt and liens are filed, the value of a partially completed structure is typically well below the amount which has been advanced and with respect to which the lender is bona fide secured. At that stage, the owner/developer has no equity in the project for which the liens can attach. The lien claimants would have only the 'statutory holdback' to which they could look for payment."

However if the lender was allowed to continue to make advances with priority in order to complete the project, the lien claimant's position may be improved to the extent that the equity is increased. The necessity of ensuring that further advances are properly secured is an issue not only for existing construction mortgagees, but also for receivers or receiver/managers appointed for contractors or subcontractors during the course of a construction project. The LRC's solution was to grant such advances priority which involves a fundamentally different and unfamiliar system to the one currently in place.

Recommendation #20

Your Committee recommends, rather than grant absolute priority for all advances for "construction" mortgages, the Act include a mechanism for an application to Court for an Order that one or more advances under a construction mortgage should be given priority over the lien claimants if such advances are proved to be intended for the bona fide purpose of enabling completion of an improvement on the land, and if it appears that such advance will result in an increased value for the land and improvement greater than or equal to the amount of the advance.

This proposal puts an onus on the mortgagee to establish its entitlement to priority while at the same time it gives other interested parties, including lien claimants, the opportunity to argue prejudice, if any.

G. OTHER RECOMMENDATIONS

1. Waiver of the Act

The current B.C. Act implies that anyone (except for a worker earning less than $15 per day) may agree that the Act shall not apply or that the remedies provided by the Act shall not be available for his benefit. The $15 figure is unrealistic in the present industry and, in any event, in order to preserve the integrity of and confidence in the system, waiver of the Act should be prohibited. (See section 99 of the Saskatchewan Act.)

Recommendation #21

Your Committee recommends that agreements to waive the Act or its remedies be prohibited.

2. Demand for particulars

Recommendation #22

Your Committee recommends that sections 16 and 17 of the Act be amended to extend the scope of the right to information (see section 82 of the Saskatchewan Act, for example), including remedies for mis-stated information or failure to provide the information.

3. Unregistered Interests in Minerals

Under the current Act, where lands are registered in the name of one party, but the subsurface minerals are subject to Crown leases or permits for recovery, there is no existing procedure for filing a lien against the interest of the lessee or permit holder, since these documents are not registered or reflected in any way in the Land Title Office. While Section 24 of the Act provides for procedures for filing Claims of Lien in respect of mining property held under the Mineral Act or Mining (Placer) Act, liens claimed in respect of a Crown granted mineral claim are excluded.

Recommendation #23

Your Committee recommends that persons doing work or supplying material for recovery of a mineral be entitled to file a lien against all estates or interests in the mineral in a manner similar to that implemented by the Saskatchewan Act.

4. Remedies for Abuse of the Act

B.C. does not currently have a section setting out specific consequences for any abuse of the Act and liability has been determined upon the common law of 'abuse of process'. After consideration, your Committee recommends inclusion of a provision similar (although not identical) to section 29 of the Alberta Act which

provides for liability for legal and other costs and damages incurred as a result of either filing a grossly inflated lien or filing a lien when the lien claimant knows or ought reasonably to know that he does not have a lien. It is also recommended that a statutory defence to such an action be provided such that the claim would be dismissed if the claimant is able to satisfy the court that the registration of the lien was made and the amount of the lien was calculated in good faith and in the bona fide belief of a meritorious claim to a lien in the amount stated.

Recommendation #24

Your Committee recommends that a section be added providing for specific consequences for an abuse of the Act, similar to section 29 of the Alberta Act, with the modifications suggested.

APPENDIX A

ORAL PRESENTATIONS

The following persons, groups, associations and companies appeared before the Committee's predecessor at its public hearings conducted throughout the Province:

Ad Hoc Committee of Material Suppliers in British Columbia
Allard Contractors Ltd.
Architectural Institute of B.C.
British Columbia and Yukon Territory Building and Construction Trades Council
British Columbia Construction Association
Canadian Home Builders Association of British Columbia
Corporation of Land Surveyors of the Province of British Columbia
Coulson, Mr. David A.
Dyck, Mr. Al
Flynn, Mr. Larry
Heather, Sadler, Jenkins
Herman, Mr. Chuck
Herron, Mr. John
Independent Contractors and Business Association of British Columbia
Iverson, Ms. Doreen
Koehli, Mr. Al
Kelsey, Mr. Norman
Lower Mainland Equipment Owners Association
Mierau Construction
Northern Society of Oilfield Contractors and Service Firms
OK Builders Supplies
Pinegrove Erectors
So-Jan Electric Ltd.
Springwest Enterprises
Struve-Dencher, Mr.
University of British Columbia, Faculty of Law
Urban Development Institute, Pacific Region
Vancouver Island Building Supply Dealers Association
Van Maren Construction
WCDC Information Services

APPENDIX B

BRIEFS

The following persons, groups, associations and companies submitted written briefs to the Committee:

A&M Non-Ferrous Metals **LJ 70/87 ***
Able Truss Ltd. **LJ 217/87 ***
Acme Pre-Hung Doors Ltd. **LJ 235/87 ***
AIRCO **LJ 71/87 ***
Ad Hoc Committee representing material suppliers and manufacturers in British Columbia - see: West Fraser Building Supplies **LJ 38/87**
Ajax Products Inc. **LJ 14/87**
Alcan Aluminium Limited **LJ 72/87 ***
Allard Contractors Ltd. **LJ 77/87 ***
Allied Aluminium Products **LJ 73/87 ***
Allmar Distributors Ltd. **LJ 74/87 ***
Almetco Building Products Ltd. **LJ 75/87 ***
Ames Brothers Distributors Ltd. **LJ 51/87**
Andrew Sheret Ltd. **LJ 68/87**
Architectural Institute of British Columbia **LJ 39/87**
- Addendum to LJ 39/87 **LJ 39a/87**
Atlas Alloys **LJ 78/87 ***
Avesta Stainless Inc. **LJ 171/87**

B.C. Plumbing Supplies Ltd. **LJ 52/87 ***
Bartle & Gibson Co. Ltd. **LJ 79/87 ***
Beairsto and Company **LJ 30/87**
Bogardus Wilson Ltd. **LJ 54/87 ***
Boyd Distributors **LJ 80/87 ***
Brenwood Mfg. (1985) Ltd. **LJ 82/87 ***
Bridge Woodworks **LJ 83/87 ***
British Columbia and Yukon Territory Building and Construction Trades Council **LJ 35/87**
- Addendum to LJ 35/87 **LJ 35a/87**
British Columbia Buildings Corporation **LJ 43/87**
British Columbia Construction Association **LJ 9/87**
- Addendum to LJ 9/87 **LJ 9a/87**
- Addendum to LJ 9/87 **LJ 9b/87**
- Addendum to LJ 9/87 **LJ 9c/87**
- Addendum to LJ 9/87 **LJ 9d/87**
See also **LJ 23/87**
British Columbia Provincial Council of Carpenters **LJ 65/87**
Brooks Carpets **LJ 67/87 ***
Buckwold-Western Wholesale Distributors **LJ 81/87 ***
Butler Brothers Supplies Ltd. **LJ 84/87 ***

Canada Comfort Homes Ltd. **LJ 218/87 ***
Canadian Bankers Association **LJ 45/87**
Canadian Bar Association, British Columbia Branch **LJ 160/87**
Canadian Homebuilders Association of British Columbia **LJ 53/87**
Canfor Building Materials **LJ 85/87 ***
Canron Inc., Western Bridge Division **LJ 86/87 ***
Cascade Windows Ltd. **LJ 87/87 ***
Central Supply Company Vancouver **LJ 88/87 ***
Coast Industrial **LJ 161/87***
Columbia Ready Mix Ltd. **LJ 89/87 ***
Construction Aggregates Limited **LJ 90/87 ***
Convoy Supply Ltd. **LJ 91/87 ***
Cook, Roberts and Whittaker **LJ 223/87**
Coquitlam Concrete Products Ltd. **LJ 92/87 ***
Coquitlam Truss Ltd. **LJ 69/87 ***
Consulting Engineers of British Columbia **LJ 224/87**
Consumers' Association of Canada, British Columbia Branch **LJ 57/87**
Corporation of Land Surveyors of the Province of British Columbia **LJ 58/87**
Coulson, David A. **LJ 170/87**
- Addendum to LJ 170/87 **LJ 170a/87**
Cronkhite Supply Ltd. **LJ 93/87 ***

D & J Carpet Discount Center Ltd. **LJ 94/87 ***
Decor Doors Manufacturing Ltd. **LJ 225/87 ***
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*** = Ad Hoc Committee of Material Suppliers in British Columbia**

APPENDIX C

RESEARCH DOCUMENTS

The following is a select list of Research Documents used by the Committee in consideration of the *Builders Lien Act* and in the preparation of this Report:

B.E.C. guarantee scheme: for small building works [by] B.E.C. Building Trust Ltd. 1987. 4p.

B.E.C. guarantee scheme: for small building works: scheme documents [by] B.E.C. Building Trust Ltd. (U.K.). 1984. 20p.

B.E.C. guarantee scheme: for small building works: where an architect/contract administrator has been appointed by the employer [by] B.E.C. Building Trust Ltd. (U.K.). 1987. 7p.

Breach of Trust Claims [by] David Bristow, Q.C. Toronto 1990, ca. 25p.

Builders Lien Act. R.S.B.C. 1979, c.40.

Builders' Lien Applications: 1988 [by] British Columbia. Ministry of the Attorney General. Land Title Branch. 1988. 1p.

Builders' Liens: towards greater assurance of payment; preliminary report [by] Alberta/industry task force on Builders' Liens. September 1988. 35p.

Construction and Mechanics' Liens in Canada [by] Douglas N. Macklem, Q.C. and David I. Bristow, Q.C. 5th Edition, 1985. 941p.

Debtor-Creditor Relationships: report-part two, Mechanics' Lien Act: improvements on Land [by] Law Reform Commission of British Columbia. 1972. 133p.

Liens in the construction industry [by] Saskatchewan. Special Advisory Committee to the Minister of Justice on Builders' Liens. 1984. CA. 400p.

Mechanics' Lien Law in the Northwest Territories: working paper number two [by] Northwest Territories. Committee on Law Reform. 1988. 63p.

Mortgages of Land: the priority of further advances: report [by] Law Reform Commission of British Columbia. 1986. 60p.

National House Building-Council: what it is, what it does [by] National House Building Council (U.K.). 1987. 17p.

Purchasers and Builders' Liens - the need for legislative reform [by] David A. Coulson. *The Advocate*. pp.445-447.

The Statutory Holdback [by] Mr. David Bristow, Q.C. Toronto 1989, 24p. (lecture notes)

Working paper on the Mechanics' Lien Act: certain substantive issues [by] Newfoundland Law Reform Commission. 1988. 294p.

APPENDIX D

EXHIBITS

The following is a select list of exhibits all of which were brought to the attention of the Committee during its review of the *Builders Lien Act* in British Columbia:

The Builders' Liens 1989. Seminar prepared by the Continuing Legal Education Society of British Columbia; October 26, 1989 [looseleaf] ca.200p.

SUMMARY OF RECOMMENDATIONS

Recommendation #1

Your Committee recommends that amendments be made to improve the flow of funds in the construction chain, to relieve the burden on the general contractor and to provide additional security to the lien claimants. In particular, the Committee recommends:

(a) the institution of a multiple holdback system; and

(b) the owner be required to place holdback funds in a separate trust account.

Recommendation #2

Your Committee recommends that:

(a) the owner be required to establish at a chartered bank, credit union or trust company a holdback trust account;

(b) the owner be required to pay the 10% holdback into the holdback trust account as periodic payments fall due to the contractor;

(c) the holdback trust account be administered jointly by the owner and general contractor, as trustees. If there is no single general contractor (i.e. the owner lets several contracts directly), then only one holdback trust account would be required, jointly trusteed by the Owner and One of the contractors or other qualified person;

(d) the funds in the holdback trust account be held in trust for those claimants in privity with the contractor, i.e. only those in privity with the general contractor would be able to make a direct claim against the holdback trust account;

(e) in the absence of some contrary agreement with the contractor, interest on the holdback trust account accrue to the owner (see section 39 of the Saskatchewan Act);

(f) the lender providing the Owner with funds for the improvement should have the right, provided the lender is a chartered bank, credit union or trust company, to have custody of the holdback trust account, in which event the owner is deemed to have complied with the requirements of the Act. This provision would permit such lenders to retain the desired control over the holdback while not jeopardizing the integrity of the holdback for the benefit of those in privity with the contractor (see sections 34(4) and 38(9) of the Saskatchewan Act);

(g) **the holdback trust account should be subject to "phased" or "progressive" release i.e. a portion should be able to be released as each contract or subcontract is completed, upon appropriate proof. In order to properly implement this proposal, provisions should be included for a substantial performance certification process for both the prime contract and subcontracts (see the Saskatchewan Act, section 41, as amended).**

(h) **the holdback trust account shall be expressly exempt from the garnishment provisions of the Court Order Enforcement Act.**

Recommendation #2A

Your Committee recommends that the residential housing sector of the industry and the Provincial Crown be specifically exempted from the holdback trust account provisions.

Recommendation #3

Your Committee recommends that in order to protect purchasers of improved property:

(a) **all such provisions should be incorporated in the British Columbia Builders Lien Act;**

(b) **subject to (d) hereof, a purchaser will be required to hold back a certain percentage of the purchase price of the property (as defined by regulation, but should not be greater than 10% of the gross purchase price), for a period of forty days from the later of:**

(i) **the completion of the conveyance: and**

(ii) **the completion, abandonment or termination of the head contract;**

(c) **assuming the purchaser is entitled to hold back a percentage of the purchase price, then the purchaser should have the right to vacate all liens upon proof of the calculation of the required holdback and payment of that amount into Court;**

(d) **if:**

(i) **the purchaser receives a certificate (in a form defined by Regulation) signed by the joint trustees of any holdback trust account applicable to that property, certifying the value of the work completed, the amount held in the holdback trust account, and that the amount held back has been correctly calculated; and**

(ii) **the purchaser does not have actual or constructive notice of a gross discrepancy with respect to the value of the work or the calculation of the holdback trust account,**

then the purchaser shall, instead of holding back a percentage of the purchase price of the property, assume the vendor/owner's responsibility as trustee of the holdback trust account;

(e) in the event that the purchaser is entitled to and does assume the vendor/owner's responsibility for the holdback trust account, then the vendor/owner is discharged of that responsibility, except to the extent of any discrepancy in the holdback trust account to the date of the conveyance;

(f) the purchaser's liability should be limited to:

(i) if the purchaser assumes a holdback trust account, to the amount of that trust account; or

(ii) where the purchaser is entitled to hold back a percentage of the purchase price, to the amount of that required holdback;

(g) in the absence of any contrary agreement with the contractor, interest on any holdback trust account assumed by the purchaser shall accrue to the credit of the vendor/owner as to interest earned up to the date of the conveyance, and to the purchaser thereafter;

(h) interest on any amount which the purchaser is entitled to hold back as a percentage of the purchase price shall accrue to the credit of the vendor/owner;

(i) any person claiming entitlement to the holdback trust account or the amount held back from the purchase price should be entitled to apply to the Court for an order for relief.

Recommendation #4

Your Committee recommends:

(a) that each payer should be entitled to make payments up to ninety percent of the value of the work, services or material unless the payer receives actual notice (not necessarily written notice) of the registration of a lien by a claimant below him in the construction chain. In that event, the payer should be entitled to withhold the amount of the lien provided the funds are deposited into a separate trust account and continue to make payments on a contract up to 90% of the price less the amount retained.

(b) the language of s.20(3) should be clarified to indicate, in accordance with the case authorities, that payment of the ninety percent results only in a defense to the payer and not an actual discharge of the registration of the lien from the title to the lands.

Recommendation #5

Your Committee recommends that:

(a) The definition of 'substantial performance' be clarified in one or both of the following ways:

(i) by reference to specific dollar values (see Alberta (1985) s.2; Saskatchewan s.2.3; Manitoba s.2; and Ontario s.2); or

(ii) by authorizing a third party by statute to provide a certificate of substantial performance.

(b) The definition of "abandonment" be limited to abandonment by one of the parties to the contract under which the lien arose and the concept of abandonment of the improvement be abolished.

(c) The phrase "otherwise determined" be eliminated and the term "terminated" be substituted.

Recommendation #6

Your Committee recommends that s.20(4) of the current Act should be abolished and s.32 amended to accord with the provisions of the Saskatchewan and Ontario Acts as set out above.

Recommendation #7

Your Committee recommends that the Noranda Rule be given legislative authority in the British Columbia Act.

Recommendation #8

Your Committee recommends that the requirement to classify a lien claimant either as a subcontractor or as a material man be abolished entirely.

Recommendation #9

Your Committee recommends that all filing times including those for strata lots be consistent and be governed by the Builders Lien Act.

Recommendation #10

Your Committee recommends that the definition of "Owner" be simplified.

Recommendation #11

Your Committee recommends that the protection afforded to a contracting owner should be equally afforded to a non-contracting owner.

Recommendation #12

Your Committee, after much consideration, recommends that:

(a) the defintion of "owner" be clarified to specifically include the Provincial Crown;

(b) the Provicncial Crown be subject to all of the provisions of the Act, with the exception of:

(i) those provisions permitting an order for sale of liened land; and

(ii) those provisions requiring a holdback trust account.

Recommendation #13

Your Committee recommends that the lien should be allowed to follow the form of the contract, and that something equivalent to s.29 of the Saskatchewan Act be adopted.

Recommendation #14

Your Committee recommends that it be made clear in the Act that a lien claimant supplying materials does not have to personally deliver the materials, and that delivery by a third party will suffice.

Recommendation #15

Your Committee recommends that "transformation" of materials should be irrelevant to the right of a lien claimant to claim a lien.

Recommendation #16

Your Committee recommends that the Workers' Compensation Board should no longer be included as a trust beneficiary.

Recommendation #17

Your Committee recommends that a "privity of trust" concept be introduced into the trust provisions to create a system of successive trusts which limits the liability of the trustee at each level such that there would have to be a contractual relationship between the claimant and the trustee before the trust claim could succeed.

Recommendation #18

Your Committee recommends that s.3 of the Act be amended to provide that: "With the exception of the provisions of s.2, nothing in this Act extends", etc.

Recommendation #19

Your Committee recommends that s.6 be amended by providing in subsection (1) that:

> **"A registered mortgage has priority over a lien to the extent of the mortgage money bona fide secured or advanced in money prior to the filing of that claim of lien...";**

and in subsection (2):

> **"Advances or payments made under a mortgage after a claim of lien has been filed shall rank after that lien..."**

Recommendation #20

Your Committee recommends, rather than grant absolute priority for all advances for "construction" mortgages, the Act include a mechanism for an application to Court for an Order that one or more advances under a construction mortgage should be given priority over the lien claimants if such advances are proved to be intended for the bona fide purpose of enabling completion of an improvement on the land, and if it appears that such advance will result in an increased value for the land and improvement greater than or equal to the amount of the advance.

Recommendation #21

Your Committee recommends that agreements to waive the Act or its remedies be prohibited.

Recommendation #22

Your Committee recommends that sections 16 and 17 of the Act be amended to extend the scope of the right to information (see section 82 of the Saskatchewan Act, for example), including remedies for mis-stated information or failure to provide the information.

Recommendation #23

Your Committee recommends that persons doing work or supplying material for recovery of a mineral be entitled to file a lien against all estates or interests in the mineral in a manner similar to that implemented by the Saskatchewan Act.

Recommendation #24

Your Committee recommends that a section be added providing for specific consequences for an abuse of the Act, similar to section 29 of the Alberta Act, with the modifications suggested.

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